In the Supreme Court of the United States

OCTOBER TERM 1976

NO. 76-588

RAFAEL RUIZ,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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Petitioner, Rafael Ruiz, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on June 18, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra* (pp. A 1-2), is reported at _ F.2d __.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1976, Appendix A, *infra* (p. A-3). A timely petition for rehearing was denied on September 21, 1976. Appendix B *infra* (p. A-4). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the petitioner was denied due process of law by being ordered to proceed with his trial after petitioner's sole retained defense counsel announced to the court that he was physically and emotionally unable to continue his responsibilities as a trial advocate and the trial court failed to hold an evidentiary hearing or accord counsel an opportunity to present documentary or other medical evidence to substantiate counsel's disability to advocate his client's cause.

STATUTE INVOLVED

The Federal Statutory provision involved, 21 U.S.C. §841 (a)(1), is set forth in Appendix C. (p. A-5). Also involved is Code of Professional Responsibility, Disciplinary Rule 2110(B) (3), set forth in Appendix D (p. A-6).

STATEMENT OF FACTS

This is a prosecution under the statute familiarly known as the Controlled Substances Act, 21 U.S.C. §841. Petitioner was indicted and tried by a jury in a two count indictment for possessing with the intent to distribute and the distribution of cocaine. The trial was held in the United States District Court for the Southern District of Florida (Atkins, D.J.). Petitioner was found guilty and sentenced to imprisonment for a concurrent term of five (5) years for each count.

During the trial the petitioner defended on a theory of entrapment, contending that the Government's confidential informant supplied him with the very cocaine which was the subject of the two charges. The Government's case-in-chief consisted of a single agent-witness who testified that he made a controlled purchase from the petitioner who did not contest the substance was cocaine. The defendant testified, denying culpability on the basis that he was supplied with the cocaine by the Government's confidential informant. In rebuttal the Government produced the confidential informant who readily admitted being a regular and well paid confidential informant but denied supplying the cocaine to the petitioner.[1]

At the critical juncture in the trial immediately preceeding the rebuttal testimony of the confidential informant, petitioner's counsel announced to the court that he was physically and emotionally spent and disabled from further representing his client, the petitioner. Specifically,

[1]The informant was paid $175.00 per week for a specified period of time, followed by a cash bonus of $40,000.00.

petitioner's counsel said that his "emotional shambles" (TR. 187) and the prescribed medication therefor rendered him unable to proceed. (TR. 190-192).

Without according petitioner's defense counsel an evidentiary hearing on the subject of his announcement or even an opportunity to present affidavits or other medical evidence in support of his announced disabilities, the district court directed counsel to proceed. The remainder of the trial concerned the confidential informant in rebuttal and final arguments.

As stated previously, the Court of Appeals for the Fifth Circuit affirmed the conviction and five year prison sentence. In doing so the court emphasized the state of the trial in that there remained only the "cross-examination of a government witness" (p. A-2), by-passing the fact that the remaining government witness was the paid confidential informant in rebuttal whose cross-examination by petitioner's counsel was singularly fundamental to the theory of defense: entrapment. The Court of Appeals also emphasized that the defense counsel offered only his unsupported statement that he was too emotionally upset to continue, and knew of his condition for three months, "yet took no steps to obtain replacement counsel. . . . " (p. A-3).

REASONS FOR GRANTING THE WRIT

The single question presented concerns the fundamental question of whether an accused is constitutionally entitled to defense counsel who is physically and emotionally capable of advocating his interests when that counsel announces to the trial court that he is disabled

from effectively representing his client and the trial court neither conducts an evidentiary hearing on counsel's announcement nor affords counsel an opportunity to present documentary and other medical evidence to support his announced disabilities.

Although the federal statute here involved is the Controlled Substances Act, 21 U.S.C. §841, the disposition of this petition and that made by the Court of Appeals necessarily involves Disciplinary Rule 2-110 (B) (3) (App. D, p. A-6). The disposition of this petition also involves the application of lower case authorities concerning the granting of a continuance due to the disability of counsel.

The thrust of the Court of Appeals' reasoning is based upon two cases cited in support of affirming the district court's denial of *counsel's* motion to withdraw: *United States v. Moriarty*, 497 F.2d 486 (5th Cir., 1974) and *United States v. Maxey*, 498 F.2d 474 (2nd Cir., 1974). But aside from the general proposition that trial motions for a continuance are directed to the discretion of the district court, which, in turn, must be judged on the circumstances present in each case, the cases are in opposite. Instead the Court of Appeals should have followed the reasoning or rationale of the following authorities.

In *United States v. Goodman*, 457 F.2d 68 (9th Cir., 1972) *cert. denied* 406 U.S. 961 defense counsel moved for a continuance due to fatigue and mental distress. The district court advised counsel that a continuance would be granted if counsel's doctor appeared and testified in support of the announced mental distress, but the counsel's physician was never called. The failure of counsel to pro-

duce the testimony in support of his announced disabilities *after being accorded an opportunity to do so* was the sole basis for the Court of Appeals for the Ninth Circuit affirming the denial of counsel's motion for a continuance.

In *United States v. Seale*, 461 F.2d 345 (7th Cir., 1972) the district court was on notice of the defendant's dissatisfaction with all but one defense counsel and directly after the jury was empaneled the defendant made a *pro se* motion in which he advised the court that all save one counsel was relieved, the excepted counsel being hospitalized. Thereafter the defendant attempted to make his own *(pro se)* opening statement to the jury but was precluded by the court. On these facts (*Seale, supra*, at 356-358) the district court should have inquired into the subject of dissatisfaction with counsel and the failure to do so was an abuse of discretion. *Id.*, at page 359.

That which transpired at the district court involved a single defense counsel [Cf. *Kobey v. United States*, 208 F.2d 583 (9th Cir., 1953); *Rolon Marxnach v. United States*, 398 F.2d 548 (1st Cir., 1968), *cert. denied* 393 U.S. 982; *United States v. Upshaw*, 448 F.2d 1218 (5th Cir., 1971)] and therefore there was no one qualified to immediately step into defense counsel's shoes with some background in the case and its issues and characteristics. Additionally, that which transpired at the district court greatly

exceeded a mere facial affliction alleged but denied in *Mende v. United States*, 282 F.2d 881 (9th Cir. 1960) as a basis to overturn a conviction.

That which transpired below must be reversed by this Court because the very counsel mandated to withdraw as an advocate by Disciplinary Rule 2-110(B)(3) when "it is unreasonably difficult for him to carry out his employment effectively" was required, according to the reasoning of the Court of Appeals, to perfect a record of such disability at the very time he announced he was in "emotional shambles" but was denied the evidentiary hearing or an opportunity to present medical corroboration of his condition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted by this Court.

Respectfully submitted,

/s/ Joseph Mincberg

JOSEPH MINCBERG, ESQUIRE
Attorney for Petitioner
420 Lincoln Road
Miami Beach, Florida 33139
Telephone (305) 531-3403

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. this 19th day of October, 1976.

/s/ Joseph Mincberg

JOSEPH MINCBERG, ESQUIRE

APPENDIX

APPENDIX A

United States Court of Appeals,
Fifth Circuit.

No. 75-3249.

UNITED STATES of America,
Plaintiff-Appellee,
v.

Rafael RUIZ, Defendant-Appellant.

June 18, 1976.

Defendant was convicted in the United States District Court for the Southern District of Florida at Miami, C. Clyde Atkins, J., of a heroin offense. Defendant appealed. The Court of Appeals held that where defense counsel had known for months that he had been criminally charged and would likely have to face trial but during such period made no attempt to substitute counsel, trial issues were not complex and the trial was substantially over when counsel moved to withdraw, the record reflected that defendant was effectively represented by such counsel and counsel offered only his own unsupported statement that he was too emotionally upset to continue with trial, the trial court did not abuse its discretion or deny a fair trial in refusing continuance and withdrawal of counsel.

Affirmed.

1. Criminal Law — 586

Matter of continuance is within trial court's discretion and rests upon circumstances of particular case.

2. Criminal Law — 593, 641.10(2)

Where defense counsel had known for months that he had been criminally charged and would likely have to face trial but made no attempt during such period to substitute counsel, trial issues were not complex and trial was substantially over when counsel moved to withdraw, record reflected that defendant was effectively represented by such counsel and counsel offered only his own unsupported statement that he was too emotionally upset to continue with trial, trial court did not abuse discretion or deny fair trial in refusing continuance and withdrawal of counsel.

Appeal from the United States District Court for the Southern District of Florida.

Before DYER, SIMPSON and RONEY, Circuit Judges.

PER CURIAM:

Ruiz appeals his heroin conviction contending that the refusal of the district court to grant a continuance and counsel's motion for leave to withdraw, was a denial of due process and rendered the trial fundamentally unfair. We affirm.

Ruiz was indicted and arraigned about four months prior to trial. Thereafter, three months prior to trial, his counsel, Estrumsa, was arrested on a fugitive warrant

arising out of a bribery charge in New York. Because of this development the district court granted one continuance two months before trial. During the course of Ruiz' trial Estrumsa was again arrested on a state of Florida Governor's warrant and placed in custody as the first step in his extradition proceedings. He was released, however, so that he could continue his representation of Ruiz. Estrumsa informed the court that he could not proceed because he was in a state of "emotional shambles." The trial, at this point, had been substantially completed. All that remained was Estrumsa's cross-examination of a government witness and closing arguments. As the district court noted, no more than an hour and a half was necessary to complete the trial and send the case to the jury. The case was not complex; it primarily involved the credibility of a government informer. Moreover, Estrumsa had known about his personal problems for three months, yet took no steps to obtain replacement counsel because Ruiz wanted Estrumsa to continue to represent him. The district court refused to grant a continuance or to allow Estrumsa to withdraw as counsel.

[1, 2] We can find no abuse of discretion in the district court's decision to continue with and complete the trial. Estrumsa offered no medical reports concerning his condition, proffered no corroborative testimony or affidavits, and did not request a hearing concerning his condition. He offered only his own unsupported statement that he was too emotionally upset to continue with the trial. It is elementary that

> [t]he matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due

process even if the party fails to offer evidence or is compelled to defend without counsel. [citations omitted] . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. [citations omitted].

Ungar v. Sarafite, 1964, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921, 931, Accord, United States v. Moriarty, 5 Cir. 1974, 497 F.2d 486.

The predicament Estrumsa found himself in was not a surprising unanticipated event. He, Ruiz, the prosecutor, and the Court had known for months that Estrumsa had been criminally charged and would likely have to face trial in New York, but he made no attempt to substitute counsel. Cf. United States v. Maxey, 2 Cir. 1974, 498 F.2d 474. Moreover, the trial issues were not complex, and the trial was substantially over at the time Estrumsa moved to withdraw. We cannot fault the trial court, in these circumstances, for requiring Estrumsa to complete the trial.

In any event, after the denial of leave to withdraw, the record clearly reflects that Ruiz was effectively represented by Estrumsa. We are convinced that Ruiz received a fair trial.

Finally, we find without merit Ruiz' contention that the prosecutor made prejudicial and inflammatory comments in his closing argument to the jury. The judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

June 18, 1976

MEMORANDUM TO COUNSEL OR
PARTIES LISTED BELOW:

No. 75-3249—U.S.A. VS. RUIZ

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.

Local Rule provides that "A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Ann Barré
Deputy Clerk

enc.
cc: Mr. Joseph Mincberg
Mr. Joel C. Fanning
Mr. Stephen M. Pave

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

September 21, 1976

TO ALL COUNSEL OF RECORD

NO. 75-3249—U.S.A. vs. Rafael Ruiz

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Clare F. Sachs
Deputy Clerk

cc: Mr. Joseph Mincberg
Messrs. Joel C. Fanning
Stephen M. Pave

PART D.—OFFENSES AND PENALTIES

§ 841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than

$50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special pa-

APPENDIX D

CODE OF PROFESSIONAL RESPONSIBILITY

CANON 2

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty To Make Legal Counsel Available

DISCIPLINARY RULES

DR 2-110 Withdrawal from Employment.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a disciplinary rule.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.